Supreme Court, U.S.
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No. 00-1718

IN THE
Supreme Court of the United States

KANSAS CITY SOUTHERN RAILWAY COMPANY, INC.,
Petitioner,

v.

J.C. JOHNSON AND KERRY LYNN JOHNSON,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Mississippi

RESPONDENTS' BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED

In this case, a jury found the defendant railroad liable for damages on the ground that its negligence caused a grade-crossing collision in which the plaintiff sustained severe and permanent brain injuries. The question presented is:

> Should this Court grant review to decide whether the Mississippi Supreme Court erred in affirming the trial court's finding that the railroad failed to produce sufficient evidence that federal funding participated in the installation of a grade-crossing sign to justify preemption of the plaintiff's claim under the Federal Railroad Safety Act (FRSA), where:
>
> (1) the principal evidence on which the railroad now relies as proof of federal funding was not a subject of the railroad's appeal, and thus was never passed on by the Mississippi Supreme Court;
>
> (2) the Mississippi Supreme Court ruling as to the sufficiency of the evidence was one of Mississippi law;
>
> (3) the parties and the Mississippi Supreme Court below all agree on the proper legal standard for determining whether the FRSA preempts the claim at issue; and
>
> (4) no other federal or state court has ever considered the question of evidentiary sufficiency decided by the Mississippi Supreme Court?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Petition Raises Questions Of State Law That Are Not Subject To Review By This Court. 4

II. This Case Does Not Present A "Changed Conditions" Issue, Which Further Undermines The Claimed Basis For Review. 13

III. Even If The Petition Presents A Properly Preserved Question Of Federal Law, And Even If The Decision Below Is Contrary To *Shanklin*, Review Should Be Denied. . . 15

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bellsouth Telecommunications, Inc. v. W.R. Grace & Co.,
77 F.3d 603 (2nd Cir. 1996) 12

Burton v. Choctaw County,
730 So. 2d 1 (Miss. 1999) 7, 10

CSX Transportation, Inc. v. Easterwood,
507 U.S. 658 (1995) 2, 15

Cook v. Mardi Gras Casino Corp.,
697 So. 2d 378 (Miss. 1997) 5

Davis v. Portline Transportes Mar. Internacional,
16 F.3d 532 (3rd Cir. 1994) 12

Dunn v. Dunn, 2001 Miss. Lexis 140 (May 24, 2001)..... 5

Evans v. Technologies Applications & Service Co.,
80 F.3d 954 (4th Cir. 1996) 12

Hester v. CSX Transportation, Inc.,
61 F.3d 382 (5th Cir. 1995) 11, 12

Kelley v. Frederic, 573 So. 2d 1385 (Miss. 1990) 7

Marshall v. East Carroll Parish Hospital Service District,
134 F.3d 319 (5th Cir. 1998) 12

Norfolk Southern Railway Co. v. Shanklin,
529 U.S. 344 (2000) 13, 14

Pearson v. Columbus & Greenville Railway,
737 So. 2d 390 (Miss. Ct. App. 1998) 16

Powers v. CSX Transport, Inc.,
97 F. Supp. 2d 1297 (S.D. Ala. 2000) 14-15

Quay v. Archie L. Crawford and Shippers Express, Inc.,
2001 Miss. App. Lexis 14 (Jan. 9, 2001) 8, 10

Reynolds v. Amerada Hess Corp.,
778 So. 2d 759 (Miss. 2000) 7

Scott v. City of Biloxi,
592 So. 2d 1003 (Miss. 1991) 7, 10

State Farm Mutual Automobile Insurance Co. v. Duel,
324 U.S. 154 (1945) 6

United States v. Williams, 504 U.S. 36 (1992) 6

Walker v. Skiwski, 529 So. 2d 184 (Miss. 1988) 7, 9

STATUTE AND RULES

28 U.S.C. 1257(a) 1

S. Ct. Rule 10 16

Miss. R. Civ. P. 56(e) 8

MISCELLANEOUS

R. Stern, et al., *Supreme Court Practice* (7th ed. 1993) 6

STATEMENT OF JURISDICTION

Respondents agree that the petition was filed within 90 days of the final judgment of the Mississippi Supreme Court. However, for the reasons stated in Part I of "Reasons for Denying the Writ," *infra* at 4-13, the questions presented by petitioner do not contain a genuine federal question within the meaning of 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

On July 18, 1995, a vehicle driven by respondent J.C. Johnson was struck by a freight train operated by petitioner Kansas City Southern Railway Company as Mr. Johnson proceeded through the Johnson Quarters Road railroad crossing in Rankin County, Mississippi. The evidence at trial showed that Mr. Johnson was traveling on a highway parallel to the railroad track in the same direction as petitioner's train, which, unknown to Mr. Johnson, "was overtaking him from behind." App. 2a. Mr. Johnson turned to the right and headed up a steep slope to the "humpbacked summit of the crossing[.]" *Id.* As he approached the crossing, Mr. Johnson's "view both up and down the tracks was seriously impaired by trees, bushes and other vegetation growing on [petitioner's] right-of-way . . .." *Id.* There were no flashing lights or other form of active protection at the crossing. Respondents alleged that the train's engineer failed to sound the horn sufficiently before the train arrived at the crossing to warn Mr. Johnson that a train was approaching at 60 feet per second. *Id.* As a result of the collision, Mr. Johnson suffered "severe and permanent injuries, consisting of a closed-head injury which has left him little more than a child." App. 3a. Mr. Johnson's wife, respondent Kerry Lynn Johnson, "suffered substantial loss of consortium." *Id.*

Respondents filed suit in Mississippi state court

claiming, among other things, that petitioner's negligence caused the crossing to be "extra hazardous" and that petitioner was liable for respondents' damages. Prior to trial, petitioner moved for partially summary judgment on the ground that any claim that the railroad crossing did not have adequate signals was preempted by federal law. Specifically, petitioner argued that such a claim was preempted by the Federal Railroad Safety Act (FRSA), as construed in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1995), because federal funds had allegedly been used to install warning devices at the Johnson Quarters Road Crossing. In support of the motion, petitioner submitted the affidavit of Newton McCormick, a Mississippi Department of Transportation (MDOT) employee, to which were attached documents purportedly evidencing the existence of federally-funded warning devices at the crossing. The trial court denied the motion for partial summary judgment, and, as explained further below, petitioner did not appeal from that decision nor did it contest the denial of partial summary judgment in its briefs to the Mississippi Supreme Court.[1]

At trial, McCormick asserted that federal money had been used sometime "back in the '80s" to fund an advance warning sign at the crossing. Tr. 150. He did not testify that he had seen the sign in place at the crossing or point to any documents evidencing federal funding, and, in fact, no one testified as to having seen the sign actually installed or in existence. After a five-day trial, the jury found petitioner negligent and awarded damages. One of the jury instructions regarding what constitutes an "extra hazardous" crossing

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[1]Moreover, as discussed below, neither McCormick's affidavit nor the documents submitted with it establish that safety devices were actually installed at the crossing with the use of federal funds.

permitted the jury to consider seven factors, including "[t]he fact that no active signals were in place." *See* Jury Instruction P-7A. After the verdict, petitioner filed a motion for judgment notwithstanding the verdict or for a new trial, which the trial court denied.

Petitioner appealed to the Mississippi Supreme Court from the jury's verdict and from the trial court's denial of its motion for judgment notwithstanding the verdict or for a new trial. Petitioner raised a number of issues on appeal, all of which were resolved in respondents' favor. As to preemption, petitioner argued briefly that the FRSA preempts any claim of "inadequate signalization" on the ground that the Johnson Quarters Road Crossing was protected by a federally-funded warning device, relying on McCormick's testimony as evidence of federal funding. The Mississippi Supreme Court rejected that argument: "KCS would like us to rely on the memory of one retired MDOT employee who claims to remember federal funds being spent at the particular crossing. We will not rule that federal funds have been spent where no documentation was produced in support thereof. There is no federal preemption in this case, and the matter is properly before this Court." App. 7a.

REASONS FOR DENYING THE WRIT

The petition should be denied for several reasons. First, the Mississippi Supreme Court did not, as petitioner contends, erect a "special evidentiary rule of documentary proof" to support a federal preemption defense. *See* Pet. (i). Rather, that court rejected petitioner's alleged evidence of federal funding at the Johnson Quarters Road Crossing because it failed to meet ordinary Mississippi law rules of proof. As a result, there is no federal question in this case. Second,

petitioner's second question presented is unavailing for an additional reason: Its factual premise — that the Mississippi Supreme Court relied on "changed circumstances" at the Johnson Quarters Road Crossing as the basis for its no-preemption holding — is simply not true. Finally, even if petitioner's preemption defense were adequately supported by proof under Mississippi law, and the errors of law that petitioner alleges were genuine, the petition should be denied because it does not present an important and recurring issue of federal law that warrants this Court's attention.

I. The Petition Raises Questions Of State Law That Are Not Subject To Review By This Court.

Petitioner claims that respondents' state-law "inadequate signalization" claim is preempted by the FRSA. The petition is premised entirely on the following syllogism: (1) Petitioner proved in the trial court that federal funds were spent for improvements at the Johnson Quarters Road Crossing. (2) Recent decisions of this Court hold that FRSA preemption of a state-law damages claim that seeks to impose liability on a railroad for failure to install a particular type of warning device at a railroad crossing is triggered by expenditure of federal funds to install warning devices at that crossing. (3) Therefore, respondents' claim seeking to impose such liability is preempted by the FRSA.

The fatal flaw in petitioner's argument is that the Mississippi Supreme Court rejected, as a matter of Mississippi law, the initial premise of the syllogism. It held that the evidence of federal expenditure was insufficient. Absent unusual circumstances, an evidentiary ruling of that kind is a question of state law that is not subject to review by this Court. Recognizing the need for a federal question, petitioner asserts that the Mississippi Supreme Court has created a "special

evidentiary rule of documentary proof to preclude the defense of federal preemption." Pet. (i). As shown below, that assertion is incorrect, and the petition should be denied on the ground that it does not present a genuine federal question.

1. The Mississippi Supreme Court held that "we will not rule that federal funds have been spent where no documentation was produced in support thereof." App. 7a. Petitioner disagrees, asserting that its preemption defense was, in fact, supported by documentary evidence. Pet. 9, 11. Petitioner relies on the affidavit of MDOT employee Newton McCormick, which petitioner attached to its motion for partial summary judgment based on federal preemption. As an initial matter, this Court need not consider whether the statements contained in the affidavit are sufficient to trigger preemption. Petitioner did not raise the propriety of the trial court's denial of its motion for partial summary judgment as an appellate issue in the Mississippi Supreme Court and that fact is fatal to the petition. In particular, petitioner did not mention the order denying summary judgment in its notice of appeal, *see* Notice of Appeal (filed Mar. 18, 1999), and, more fundamentally, it did not mention, let alone challenge, the trial court's summary judgment ruling in its appellate briefs. Under Mississippi law, therefore, petitioner waived this issue. *See, e.g., Cook v. Mardi Gras Casino Corp.*, 697 So.2d 378, 383 (Miss. 1997); *Dunn v. Dunn*, 2001 Miss. Lexis 140, *22 (May 24, 2001) ("the other issues not raised or addressed on this appeal are hereby deemed waived."). Thus, although petitioner decries the Mississippi Supreme Court's supposed failure to address McCormick's affidavit, *see* Pet. 11 & n.11, that court was simply responding to what was before it: an appeal from the jury's verdict and from the trial court's denial of petitioner's motion for judgment notwithstanding the verdict or for a new trial, Pet. 10, neither of which had anything to do with McCormick's affidavit or any

other "documentation" regarding preemption.[2]

Because the Mississippi Supreme Court did not consider the issue and petitioner did not present it to that court, this Court lacks jurisdiction to consider the evidentiary value of the McCormick affidavit. *See, e.g., United States v. Williams*, 504 U.S. 36, 41 (1992); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [state] Supreme Court did not pass on the question, we may not do so."); *see generally* R. Stern, et al., *Supreme Court Practice* 126-27 (7th ed. 1993).

2. Even if petitioner had properly preserved the summary judgment issue in the Mississippi Supreme Court, the trial court's denial of petitioner's motion for partial summary judgment based on FRSA preemption necessarily involved a garden-variety application of state evidence law and thus would not be properly before this Court. Petitioner is incorrect that the Mississippi Supreme Court created "a special rule of documentary proof" for the federal preemption defense. As noted above, the only evidence submitted in support of the motion for partial summary judgment was the McCormick affidavit. Under Mississippi law, an appellate court must

> analyze[ ] all affidavits, admissions in pleadings, interrogatory answers, depositions and other matters of record, and consider[ ] all such evidence in the light most favorable to the party against whom the motion for summary judgment was made. ...

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[2]Indeed, the McCormick affidavit and its attachments were not admitted in evidence or mentioned at trial and therefore they could not have had any logical connection to a motion for judgment notwithstanding the verdict or for a new trial.

> All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion. A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.

Burton v. Choctaw County, 730 So.2d 1, 3 (Miss. 1999) (citations omitted). "[A]ffidavits and other evidence must be sworn, made upon personal knowledge, and show that the party providing the factual evidence is competent to testify." *Id.* at 3-4. "[C]onclusory affidavits . . . have little value above that of the paper they are written on." *Kelley v. Frederic*, 573 So.2d 1385, 1387 n.2 (Miss. 1990). *See also Reynolds v. Amerada Hess Corp.*, 778 So.2d 759, 765 (Miss. 2000) ("affidavit . . . must do more than make general assertions and legal conclusions"); *Scott v. City of Biloxi*, 592 So.2d 1003, 1005 (Miss. 1991) (reversing summary judgment based on affidavit that was "conclusory, opinionated, and obviously based only on information and belief."); *Walker v. Skiwski*, 529 So.2d 184, 187 n.2 (Miss. 1988) (criticizing affidavits as "wholly conclusory. They give ultimate opinions with very little in the way of facts and specifics in support.").

Notwithstanding this heavy burden, petitioner claims that McCormick's affidavit constituted "clear, undisputed evidence" that federal funds participated in the installation of an advance warning sign at the Johnson Quarters Road Crossing. Pet. 13 n.12. The affidavit states (at ¶ 4):

> Specifically, federal funds were used, as described above, at the Johnson Quarter Road crossing, Pelahatchie, Rankin County, Mississippi, Crossing

> Identification Number 305120L, by installing one advance warning sign and one inventory marker. Attached hereto as Exhibit "A" and incorporated herein by reference are the MDOT documents reflecting these installations.

Although McCormick claimed that he was "personally familiar with the use of federal funds" (*id.* ¶ 1), his affidavit contains no factual basis for this conclusion, leaving the factfinder to speculate how McCormick knew that the money for the alleged sign came from the federal government.[3]

The affidavit does not explain how McCormick knew that the alleged sign was actually installed at the crossing, which presumably would have been stated had McCormick personally installed it. The reader is again left to speculate as to the basis for McCormick's knowledge of the sign's installation. This deficiency demonstrates that the affidavit did not meet the requirements necessary to obtain summary judgment in Mississippi:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Miss.R.Civ.P. 56(e). *See also Quay v. Archie L. Crawford and Shippers Express, Inc.*, 2001 Miss. App. Lexis 14, *20 (Jan. 9, 2001) ("no probative value can be accorded . . . testimony if

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[3]Respondents refer to the "alleged" sign because, as discussed below, there is considerable doubt whether *any* sign was installed at the Johnson Quarters Road Crossing.

there is a genuine issue as to whether [the witness] is testifying from personal knowledge.").

Petitioner points to the two pages attached to McCormick's affidavit as demonstrating the proof of federal expenditure. Pet. 11 n.11. However, those documents do not help petitioner because they do not state, or even suggest, that federal funds participated in the installation of an advanced warning sign at the Johnson Quarters Road Crossing. The first page, labeled "Crossings for County Rankin," suggests that an advance warning sign was at some time contemplated for the crossing (because what appears to be a "1" is under the heading "ADV WRN"), which the affidavit refers to as "Crossing Number 305120L," the same number referenced in the McCormick affidavit. *See* R. 408. On the other hand, under the column labeled "WARNING DEVICE," the entry for "Crossing Number 305120L" is "NONE," whereas there are specific entries (such as "crossbucks" or "stop signs") corresponding to the great majority of the other crossings. *See id.* This ambiguity is not addressed in McCormick's affidavit. Most significantly, the first page says *nothing* about the expenditure of federal funds. The second page — which appears to be a list of characteristics at various crossings, identified by number — refers to a project number and Rankin County. R. 409. However, absent from this list of crossing numbers is "305120L" referred to in McCormick's affidavit as the number corresponding with the Johnson Quarters Road Crossing. Thus, although petitioner makes much of the supposed fact that the second page contains "federally funded project number—RRP-0061(4)," *see* Pet. 11 n.11, nothing in the affidavit or the document itself establishes the significance of RRP-0061(4) or its connection to the Johnson Quarters Road Crossing. Thus, this case is a textbook example of one in which the "purported establishment of the facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable

confidence that the full facts of the matter have been disclosed." *Burton*, 730 So.2d at 4.

The trial court's finding that petitioner failed to meet its burden to establish the affirmative defense of preemption is not in any way inconsistent with the way in which summary judgment motions have been evaluated by that court in other cases. For example, in *Scott v. City of Biloxi*, 592 So.2d at 1004, the court addressed the propriety of a summary judgment based on the absence of insurance coverage. The City of Biloxi's motion for summary judgment was based on the affidavit of its mayor, who stated that the city had no insurance coverage for the incident in question. *Id.* The court noted that the city had failed to include in the record appropriate documentation reflecting the absence of insurance, and specifically held that "the absence of this document is not cured by the Mayor's affidavit which is conclusory, opinionated, and obviously based only on information and belief." *Id.* at 1005.

Here, in addition, strong circumstantial evidence contradicts McCormick's affidavit: the absence of the sign at the crossing. *See infra* Part II. No one testified that he or she personally installed the sign or actually saw the sign at the crossing after it was installed. This circumstantial evidence casts additional doubt on the reliability of the McCormick affidavit. *See Quay*, 2001 Miss. App. Lexis 14, *13 ("we are not aware of any case law which holds that circumstantial evidence is insufficient to raise a question of fact in the summary judgment context.").

3. In McCormick's trial testimony — which the Mississippi Supreme Court addressed and rejected as insufficient to prove the requisite federal expenditure — McCormick reiterated his previous conclusory statement that federal funds were spent "to put an advance warning sign back

in the '80s." Tr. 150. McCormick did not testify that he actually saw the sign after it was allegedly installed and did not explain how he had personal knowledge that the sign was purchased with federal funds. Moreover, McCormick's vague, conclusory testimony was circumstantially refuted by a survey plat of the crossing that did not indicate the presence of the sign. Ex. 27A, Tr. 171. And, at trial, petitioner offered *no documentary evidence at all* concerning the installation of the sign or the expenditure of federal funds for that purpose. Given the nature of the issue in question, there is good reason for the Mississippi Supreme Court's insistence on clear-cut documentary proof. There are hundreds, if not thousands, of crossings in Mississippi. R. 409 (suggesting that there are at least 32 crossings in Rankin County alone). As McCormick's vague testimony about what allegedly occurred "back in the '80s" demonstrates, it is important to secure definitive proof tying federal funding to specific work at specific crossings, rather than relying on the distant memory of a single employee. App. 7a.[4]

Petitioner essentially concedes that the question presented is one of state law when it notes that the Mississippi Supreme Court's rejection of McCormick's evidence "conflicted with both other courts and with Mississippi law on statements made under oath." Pet. 11. With respect to "other courts," petitioner's principal submission is that the decision below conflicts with *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), because *Hester* found preemption based, in part, on evidence from McCormick regarding expenditure of federal funds at another grade crossing. *Hester*

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[4]As noted *supra* note 2, petitioner chose not to introduce the documents it had previously attached to McCormick's affidavit.

is irrelevant. In that case, the railroad "presented evidence, *including* [MDOT] records" *and* an affidavit from McCormick showing that, for a two-year period, federal funds were actually expended for three specific safety upgrades at the crossing in question. *Id.* at 382 (emphasis added). The Fifth Circuit specifically found that "[t]he documentary evidence clearly demonstrates that federal funds did participate in the installation." *Id.* at 386 n.7. Here, as noted earlier, no documentary evidence was before the Mississippi Supreme Court because petitioner did not appeal from the denial of its motion for partial summary judgment; moreover, as shown above, even if that evidence had been before the court, it does not, to put it mildly, "clearly demonstrate" expenditure of federal funds for improvements at the Johnson Quarters Road Crossing.

More fundamentally, *Hester* does not demonstrate a conflict on the question presented: Because *Hester* arose in federal court, it necessarily ruled on the sufficiency of evidence under federal law, and the decision below necessarily did so under Mississippi law. Respondents believe that a federal court, confronted with the same lack of proof as presented here, would have come to the same conclusion as did the Mississippi Supreme Court.[5] However, the key point is that the sufficiency question is one of state law, not federal law, as was the case in *Hester*.

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[5]*See, e.g.*, *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); *Bellsouth Telecomms., Inc. v. W.R. Grace & Co.*, 77 F.3d 603, 615 (2nd Cir. 1996); *Davis v. Portline Transportes Mar. Internacional*, 16 F.3d 532, 537 n.6 (3rd Cir. 1994).

The foregoing discussion demonstrates the irrelevancy, at this stage of the litigation, of the McCormick summary judgment affidavit, and the evidentiary insufficiency of both that affidavit and McCormick's testimony to support a preemption defense. However, the question before this Court is *not* whether the Mississippi Supreme Court's evidentiary finding is correct as a matter of Mississippi law — although respondents believe it is — but rather whether the Mississippi Supreme Court created a special rule of evidence applicable only to preemption questions so as to especially burden the assertion of a federal defense. It did not, and therefore review should be denied.

II. This Case Does Not Present A "Changed Conditions" Issue, Which Further Undermines The Claimed Basis For Review.

Seeking to create a conflict between the decision below and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), petitioner claims that the Mississippi Supreme Court's no-preemption holding was based on that court's belief that "changed circumstances at a crossing following the installation of federally funded traffic control devices terminate the federal preemption of a railroad's duty under state tort law to install adequate warning devices at rail-highway crossings[.]" Pet. (i). Simply stated, that is not true. The court below did not hold that the claim here escapes preemption because circumstances changed after the installation of federally funded warning devices at the Johnson Quarters Road Crossing.

Petitioner is able to conjure up a "changed circumstances" issue only by putting words in the Mississippi Supreme Court's mouth. Petitioner baldly asserts that "[b]efore even considering the sufficiency of the evidence of McCormick's testimony, the Mississippi Supreme Court

rejected KCS's claim of federal preemption as to the federal funded warning sign on the ground 'there is no evidence of its existence' *at the time of the accident.*" Pet. 20 (emphasis added). But the Mississippi Supreme Court never used the term "at the time of the accident." *See* App. 7a. Rather, as explained below, it held that the evidence was insufficient to prove that a federally-funded sign was *ever* installed. *See id.*

Thus, the problem here is altogether different from a claim of changed circumstances. There is a lack of evidence in this case that a federally-funded warning device was ever installed at the crossing. *No one* testified that anyone actually saw the sign after it allegedly was installed, and, in fact, as explained above, one of the documents attached to the McCormick affidavit casts serious doubt on whether any sign was ever installed in the first place.

On this issue, it is useful to quote *Shanklin* in its entirety regarding "changed circumstances": "Whether the State should have originally *installed* different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Shanklin*, 529 U.S. at 358 (emphasis added). The assumption that installation is necessary to trigger preemption appears throughout the Court's opinion. *E.g., id.* at 357 ("When the FHWA approves a crossing improvement project and the State *installs* the warning devices using federal funds, [that] displaces state tort law addressing the same subject") (emphasis added); *id.* at 356 (referring to "devices *installed* for 'minimum protection' and those *installed* under a so-called 'priority' or 'hazard' program") (emphasis added). Thus, the Court understood that mere commitment of federal funds was not sufficient for preemption to occur. *Accord Powers v. CSX Transp., Inc.*, 97

F. Supp. 2d 1297, 1305 (S.D. Ala. 2000). The Court did say that a change in circumstances after installation, which might require a different type of warning device, would not be sufficient to defeat preemption, but that was not the basis for the Mississippi Supreme Court's ruling below.

III. Even If The Petition Presents A Properly Preserved Question Of Federal Law, And Even If The Decision Below Is Contrary To *Shanklin*, Review Should Be Denied.

Part I above demonstrates that much of the preemption defense (regarding the McCormick affidavit) was not properly preserved and that the petition depends wholly on a question of state, not federal, law. Part II demonstrates that this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Shanklin* were honored by the court below because petitioner failed to prove that a warning device was installed using federal funds. However, even if there were doubt on those questions, review should be denied for two separate, but related reasons.

First, assuming that the Mississippi Supreme Court misconstrued the evidence regarding expenditure of federal funds, the only question here would be whether, on the unique facts of this case, established preemption principles were violated. There is no question that the Mississippi Supreme Court understood the controlling preemption principle — expenditure of federal funds used for the installation of warning devices — because that principle was the focus of the preemption portion of its decision. App. 7a. Review of the decision below would thus involve asking whether the Mississippi Supreme Court misapplied this Court's FRSA precedents when it reviewed the particular evidence presented here, *i.e.*, a classic situation where review is inappropriate. *See*

S. Ct. Rule 10 (review "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

Petitioner seeks to evade that fundamental problem by claiming that the decision below "demonstrat[ed] an unwillingness to follow this Court's binding precedent." Pet. 21. But that is not so. Nothing about the decision below suggests disdain for this Court or for federal law, but only a concern that an affirmative defense be supported with adequate proof. In this case, if the denial of petitioner's partial summary judgment motion had been properly appealed and the relevant testimony and documents had proved an expenditure of federal funds to upgrade the relevant crossing (which they do not), the decision would have come out the other way because the court below plainly understood that preemption turns on the funding/installation question.[6]

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[6]Petitioner's criticism of the Mississippi Supreme Court's citation to *Pearson v. Columbus & Greenville Railway*, 737 So.2d 390 (Miss. Ct. App. 1998), *see* Pet. 21 n.18, is bewildering, since *Pearson* was discussed with approval by *petitioner* below. *See* Brief of Appellant, at 18, in *Kansas City So. Ry. Co. v. J.C. Johnson and Kerry Lynn Johnson*, No. 1999-CA-00505 (Miss. Dec. 13, 1999). To be sure, *Pearson* may reflect a pre-*Shanklin* understanding of the *kinds* of warning devices that must be placed at certain grade crossings. However, the Mississippi Supreme Court's decision had nothing to do with the kind of warning device that should have been installed at the Johnson Quarters Road Crossing. It was based solely on the failure of proof that *any* warning device had been installed with the use of federal funds. Indeed, the Mississippi Supreme Court relied on *Pearson* to buttress that

(continued...)

Complaining of "continued efforts to undermine [the] FRSA," petitioner asserts that the Mississippi Supreme Court's alleged error will have far-reaching effects on "many cases[,]" Pet. 23, but it does not point to a single decision other than the decision below in support of its position. Similarly, petitioner asks the Court to grant review "to make clear that, like with other changed circumstances claims, changes in the conditions of the crossing . . . are not relevant to federal preemption analysis under FRSA . . .." Pet. 21. But petitioner does not explain what "other," post-*Shanklin* changed-circumstances claims it is referring to, and the present case is certainly not one of them. As explained above (in Part II), the Mississippi Supreme Court did not hold that circumstances had changed, only that the railroad was required to prove installation of a warning device with federal funds at the grade crossing. The need to prove funding and installation is a natural and mundane outgrowth of the decisions in *Easterwood* and *Shanklin*. Implementing that aspect of *Easterwood* and *Shanklin* does not divide the lower federal courts or the state appellate courts, and petitioner does not argue otherwise. Thus, that issue does not warrant this Court's attention.

Second, not only would this Court's review turn on the highly idiosyncratic facts relating to federal funding at the Johnson Quarters Road Crossing (and thus affect only this case), but there is very little chance that the result below would be altered if review were granted. As noted above (at 2-3), under jury instruction P-7A, the jurors were told that, in

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[6](...continued)
aspect of its ruling. App. 7a ("*Pearson* stands for the proposition that there must be more than the existence of a [grade crossing] plan in that the plan must also have been implemented.").

deciding whether the crossing was "extra hazardous," they "may" consider, among seven different factors, "[t]he fact that no active signals were in place." That jury instruction provided the only arguable causal link between "inadequate signalization" and a finding of liability, and it does not suggest that signalization would have played a significant, if any, role in the verdict. That appears to have been petitioner's view as well, since it did not even object to the jury instruction on preemption grounds. Tr. 656, 683-84. Until petitioner began looking for a federal question on which to premise this Court's review, signalization played a minor role in this case. Indeed, even on appeal in the Mississippi Supreme Court, federal preemption took up only three short paragraphs in petitioner's 49-page brief. *See* Brief of Appellant, at 17-18, in *Kansas City So. Ry. Co. v. J.C. Johnson and Kerry Lynn Johnson*, No. 1999-CA-00505 (Miss. Dec. 13, 1999). On the issue of whether the crossing was "extra hazardous," petitioner focused on matters other than inadequate signalization, including the sight distance at the crossing, the condition of the roadway surface between the railroad ties, the "humpback" nature of the crossing, the varying width of the roadway surface, the degree of slope in the approach to the crossing, and the number of daily trains and their typical speed. *See id.* at 7-17, 20-21. Other issues, including petitioner's alleged failure properly to sound the train horn and to clear its right-of-way of obstructive vegetation, also figured prominently on appeal. *Id.* at 21-26, 40-41. In light of these non-preemption issues, all of which bore on whether petitioner's negligence caused respondents' injuries, it is quite unlikely that "inadequate signalization" played a role in the jury's liability finding and equally unlikely that a decision of this Court will affect the case's ultimate outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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